No. 12-682

In The Supreme Court of the United States

BILL SCHUETTE, Attorney General of Michigan,

Petitioner,

vs.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS, AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* FOR XIV FOUNDATION; MARC SCHNIEDERJANS, NEBRASKA CIVIL RIGHTS INITIATIVE; RACHEL ALEXANDER, ARIZONA CIVIL RIGHTS INITIATIVE; LEON DROLET, MICHIGAN CIVIL RIGHTS INITIATIVE; GARY HOPPER, NEW HAMPSHIRE HOUSE OF REPRESENTATIVES; GLYNN CUSTRED, AUTHOR, CALIFORNIA CIVIL RIGHTS INITIATIVE; SEN. JOE HUNE, MICHIGAN SENATE; SEN. DAVID B. ROBERTSON, MICHIGAN SENATE; REP. PETE LUND, MICHIGAN HOUSE OF REPRESENTATIVES; LARRY P. ARNN, FOUNDING CHAIRMAN, CALIFORNIA CIVIL RIGHTS INITIATIVE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

One by one in the pursuit of genuine racial equality that has eluded the Republic since its founding, states are promulgating in their constitutions and statutes laws that strip government agencies and their subdivisions – in this case, universities, with respect to their admissions policies – of the ability to use racial preferences; in reviewing those laws, lower courts are extending and applying this Court's "political process" doctrine with results that are markedly different; as such, Petitioner's application for review by this Court as to the application, clarity, and proper reach of the doctrine is of the greatest urgency. Should this Court grant Petitioner's application for Writ of Certiorari?

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INTEREST OF *AMICI CURIAE*[1]

The *amici* represented in this brief are citizens and elected officials of their states who have championed a quantum leap forward to achieve the dreamed-of society that is conscious only of one's character, irrespective of race, sex, color, ethnicity, or national origin. They have worked diligently within their respective jurisdictions to convince their fellow citizens that discrimination based on race, sex, color, ethnicity, or national origin with respect to, *inter alia*, college admissions, ultimately harms all of humanity – the purpose or good intentions of such discrimination notwithstanding. The *amici*, therefore, represent the collective voices of millions of Americans who want their governments to practice in law what the *amici* and their fellow citizens do in their own daily lives.

[1] Pursuant to Rule 37 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

This case represents a waypoint with two distinct characteristics: First, it posits a marker upon the legal landscape of Fourteenth Amendment jurisprudence and, in so doing, represents a stark departure from the determination in *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir 1997), its progeny, and those courts that have followed its reasoning with respect to the relationship between this Court's political-process doctrine and the Fourteenth Amendment's Equal Protection Clause. This legal marker is no small matter: While Western history is repleat with animus between peoples separated by religious identity or socio-economic class, this Republic stands alone in its struggle to come to terms with its racial identity and the equal protection of the law to all persons. Therefore, the applicability, proper reach, and perhaps even the continued viability of the political-process doctrine laid out by this Court in *Hunter* v. *Erickson,* 393 U.S. 385 (1969) and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), and applied by the court below in this case, matters greatly in this struggle to achieve the dreamed-of society, wherein the content of one's character obliterates any consideration by government of a person's race, sex, color, ethnicity, or national origin. Such disparate application of the doctrine will continue to vex the public policy direction of this country unless and until this Court acts decisively on the issues raised in Petitioner's application.

The second marker occasioned by this case is far more subtle but just as notable as the first: the people of the Republic have "moved on" in their attitudes, norms, and practices with respect to race, sex, color, ethnicity, and national origin; moreover, their perceptions and treatment of one another along those classifications has evolved far more quickly than the speed or dexterity with which our courts – including this Court – have. So while our courts toil among the thistles of predecent and the jurisprudential history of law and race in America, the citizens themselves have moved far beyond the current legal horizon and walk with a determination of their own toward the dreamed-of Republic that is racially tolerant and discrimination-free. In a nutshell, the ground below the legal landscape has shifted.

In this case, the pilgrimage toward equality is embodied by Michigan's Civil Rights Initiative, now MICH. CONST. art. I, § 26, and *amici* respectfully call upon this Court to grant Petitioner's application and address the legal questions raised below.

ARGUMENT

I. Lower courts' application of the political-process doctrine with respect to alleged violations of the Fourteenth Amendment's Equal Protection Clause has been narrow, and applied to only *avoid* illicit government discrimination, never to mandate it, as the result below would require; as such, this Court should grant Petitioner's request for Writ of Certiorari.

This Court should grant Petitioner's application because lower courts need firm, clear direction as to the applicability of the political-process doctrine to citizen-led efforts, where the effort is one which seeks to amend the state's laws to prohibit, *inter alia*, racial discrimination. Without such clarity, states and federal courts will continue to struggle with race and gender equity and, in so doing, stymie citizen-led progress toward racial equality.

Indeed, applicability of the doctrine has proven to be somewhat vexatious for courts as the ground below the legal landscape of the doctrine has continued to shift.

Under the political-process doctrine, a state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size," *Hunter*, at 393. In *Hunter*, the City of Akron, Ohio, sought to enact a fair-housing scheme to

ameliorate substandard housing, which also acted as an agent of racial segregation. As this Court in *Hunter* observed, the scheme was:

> [P]remised on a recognition of the social and economic losses to society which flow from substandard, ghetto housing and its tendency to breed discrimination and segregation contrary to the policy of the city to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin. A Commission on Equal Opportunity in Housing was established by the ordinance in the office of the Mayor to enforce the anti-discrimination sections of the ordinance through conciliation or persuasion if possible, but, if not, then through such order as the facts warrant, based upon a hearing at which witnesses may be subpoenaed, and entitled to enforcement in the courts.

Hunter at 386. [Internal citations omitted.]

Akron voters, though, subsequently approved an amendment to the city's charter which prohibited the city from enacting any ordinance regulating "the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry (without first being) approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." *Hunter* at 387. The amendment, Akron City Charter § 137, was

also retroactive such that it directly affected the city's ameliorative fair-housing scheme.

The result in *Hunter*, an 8-1 decision, was that this Court determined the charter amendment violated the Equal Protection Clause because the amendment stripped government of an ability (the fair-housing scheme) to thwart discrimination in housing, which discrimination was racially based.

More than a decade later in a much closer decision (5-4), this Court in *Seattle* extended application of the political-process doctrine to a statewide initiative approved by the state of Washington's voters, Initiative 350, that proscribed any school district's use of mandatory assignments of students outside of their local districts to achieve racial integration in schools.[2]

The *Seattle* court relied almost entirely in its decision on *Hunter* to extend the doctrine to the initiative's prohibitory effect and declared it unconstitutionally violative of the Equal Protection Clause.

> [B]y specifically exempting from Initiative 350's proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly

[2] The provision at issue read: "[N]o school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student. . . ." *Seattle* at 462.

> requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government. In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws barring *de facto* desegregation as against those who . . . would otherwise regulate" student assignment decisions; the reality is that the law's impact falls on the minority.

Seattle at 474-475, citing *Hunter* at 391.

In this case the court below extended *Hunter* and *Seattle* into the realm of using race as a "plus factor" in college admissions as though the use of race were *mandatory* to achieve a compelling governmental interest (racial diversity of the student body), relying on this Court's decision in *Grutter* v. *Bollinger,* 539 U.S. 306 (2003).

As the Sixth Circuit framed the issue,

> the sole issue before us is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions – something they are specifically allowed to do under *Grutter*.

Coalition to Defend Affirmative Action, Integration & Immigrant Rights, et al. v. *Regents of Univ. of Michigan*, 08-1387, 2012 WL 5519918 (6th Cir. Nov. 15, 2012) (emphasis original).

This Court determined in *Grutter* that the University of Michigan's use of *multiple* criteria – not just race alone – justified the university's use of race as a "plus" factor to achieve a diverse law student population.

> The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a "highly individualized, holistic review."

Parents Involved in Community Schools v. *Seattle School District No. 1*, *et al.*, 551 U.S. 701, 722-723 (2007), quoting *Grutter* at 337. Thus, whereas in *Hunter* and *Seattle*, race was the *only* consideration when applying the political-process doctrine, the court below ignores the "holistic" character of *Grutter*'s reasoning.

Therefore, *amici* ask this Court to grant Petitioner's application to settle the question of the extent to which *Grutter* – if at all – affects the political-process doctrine and determine that the doctrine is not applicable to MICH. CONST. art. I, § 26.

II. Without this Court's guidance to resolve the dispute among the circuits, colleges and would-be students face the menace of misapplication of the political process doctrine as more states approve of measures to end racial preferences.

This Court should grant Petitioner's application because numerous states, including those within and without the Ninth and Sixth Circuit courts,[3] have already approved measures to end racial preferences; as such, without this Court's guidance, other circuit courts are highly likely to apply (or misapply) the political-process doctrine and thus cause disparate treatment of college applicants based on race. As such, Petitioner's application raises a timely, important question of law.

This Court will review important questions of law arising in separate cases decided differently among the circuits. See *Tapia* v. *United States*, 564 U.S. ___ (2011), resolving a split among circuit courts to determine whether sentencing courts can impose prison sentences longer than normal in order to provide drug treatment; *AT&T* v. *Hulteen*, 556 U.S. 701, 707 (2009), resolving a split to determine whether reliance on a certain pension benefit rule constituted a violation of Title VII; *Irizarry* v *United States*, 553 U.S. 708 (2008), resolving a split to determine whether

[3] See Petitioner's brief, at 3.

FED. R. CRIM. P. 32(H) applies to sentencing variations.

In this case, Petitioner asks that this Court resolve the distinct split between the Ninth Circuit's decision in *Coalition for Economic Equity* v. *Wilson* and the Sixth Circuit's decision below, especially with respect to the reach of the political process doctrine and in light of this Court's decision in *Grutter* and the Ninth Circuit's recent decision in *Coalition to Defend Affirmative Action* v. *Brown*, 674 F.3d 1128 (9th Cir. 2012), which reaffirmed its holding in *Wilson*.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask that this Court grant Petitioner's application for Writ of Certiorari.

Respectfully submitted,

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